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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 835

J. A. ZACHARIASSEN & CO.,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, J. A. Zachariassen & Co., respectfully submit their petition for a writ of certiorari to review the decision of the United States Court of Claims dismissing the petition in that Court.

Summary Statement of the Matter Involved.

Petitioners are a Finnish copartnership, and instituted this suit in the Court of Claims for losses sustained as a result of the uncompensated detention of the sailing vessel ALBYN in New York Harbor from March 23, 1918, until July 31, 1918.

This and eleven similar claims in behalf of the owners of other Finnish sailing vessels named in the jurisdictional act hereinafter set forth, were filed originally with the State Department by the Finnish Minister to the United States, pursuant to instructions from his government. Said claims were pending in the State Department for a number of years prior to June 28, 1936, when an Act of Congress (49 Stat. 2368) authorizing suits in the Court of Claims was approved by the President.

The Act is set forth in full at pages 1-3 of the record. Section 2 thereof reads as follows:

> "Sec. 2. In determining the said claims, the Court of Claims shall pass solely on the following questions:
>
> "1. Were the thirteen Finnish sailing vessels named herein, or any one or more of them, detained by the United States?
>
> "2. If the preceding question is answered in the affirmative, was such detention unlawful?
>
> "3. If the second question is answered in the affirmative, is the United States obligated to indemnify the owner or owners, or their successors in interest, of the vessel or vessels found to have been unlawfully detained?
>
> "4. If the third question is answered in the affirmative, what indemnity should be paid by the United States with respect to each vessel found to have been unlawfully detained?"

All twelve suits have been tried, but a decision has been rendered in this case only and Special Findings of Fact and Conclusions of Law were made upon which judgment was entered on June 2, 1941, dismissing plaintiffs' petition. The Court of Claims found, in answer to the first question that the ALBYN was detained (Special Finding of Fact No. 17, R. 28).

In answer to the second question, the Court found that the detention was not unlawful (Special Finding of Fact No. 18, R. 28).

Although the Court need not have gone further after finding that the detention was not unlawful, it nevertheless did find, in answer to the third question, that "If it should be held that the ALBYN was unlawfully detained" the United States would be obligated to indemnify the owners for the damages sustained (Special Finding of Fact No. 20, R. 28).

In answer to the fourth question, the Court found that the United States should pay the owners $61,139.62 (Special Finding of Fact No. 20, R. 28).

A timely motion for a new trial, filed on July 30, 1941, was denied without opinion on October 6, 1941 (R. 36).

The judgment of dismissal is final, and this petition is filed to obtain a review of the decision of the Court of Claims, in accordance with the last sentence of Section 5 of the Jurisdictional Act.

The ALBYN was chartered on December 18, 1917, to Vacuum Oil Company for a cargo of petroleum in cases from New York to ports in British territory on the east coast of South Africa (Special Finding of Fact No. 4, R. 10-11).

The charter was approved by the United States Shipping Board on December 21, 1917, pursuant to the provisions of the Shipping Act, and by the Inter-Allied Chartering Committee of London, England, on December 18, 1917, pursuant to the provisions of said charter (Special Finding of Fact No. 4, R. 10-11). License for the export of the cargo was granted to Vacuum Oil Company by the War Trade Board, pursuant to the provisions of the Espionage Act, prior to December 18, 1917 (Special Finding of Fact No. 5, R. 11).

The ALBYN arrived in New York Harbor on February 14, 1918, made ready for loading under said charter, began loading on March 14, 1918, completed loading on March 22, 1918, and was ready to sail on March 23, 1918. The vessel

loaded 85,256 cases of petroleum upon which a total freight of $98,897.25 was paid in accordance with the terms of the charter (Special Finding of Fact No. 6, R. 11).

On March 18, 1918, J. F. Whitney & Co., the New York agents for the ALBYN, applied to the War Trade Board for a bunker license for ship's stores necessary for the voyage, in accordance with the provisions of the Espionage Act and regulations issued by the War Trade Board, which had been created by the President for the administration of said Act (Special Finding of Fact No. 9, R. 16-17).

The bunker license was refused until July 12, 1918, on which date it was granted (Special Finding of Fact No. 9, R. 16-17). Thereafter the vessel again made ready for sea, re-stocked her supplies, obtained a new crew, and sailed as promptly as possible thereafter, on July 31, 1918, carrying the same cargo that had been loaded in March, under the charter to Vacuum Oil Company, to the ports therein named (R. 54-55, 57, Special Finding of Fact No. 17, R. 28).

When the requested bunker license did not arrive within the usual few days after application was made therefor on March 18th, inquiry was made by the ship's agents at the War Trade Board Office in New York, but no information could be obtained except that the delay was undoubtedly due to routine in the Washington office (R. 102-103). On March 22nd, when the vessel otherwise was ready to sail, application was made at the Custom House in New York for clearance of the vessel, but when it was explained that no bunker license was being presented, due apparently to routine delay thereon in the Washington Office of the War Trade Board, clearance was refused, solely because no bunker license was presented (Special Finding of Fact No. 10, R. 17).

Continuously thereafter, until April 17th, the ship's agents inquired of the War Trade Board for said license, as well as for similar licenses for others of the thirteen Finnish vessels named in the jurisdictional act, which had begun

to arrive in New York and load under charters for similar voyages, without results (R. 39-40, 102-104).

On April 17th a representative of the Shipping Board called at the office of the ship's agents in New York, and made an offer to charter the ALBYN and the said other Finnish vessels and stated that until and unless the vessels were chartered to the Shipping Board they would not be allowed to sail (R. 41-42, 59-60, Deft's Ex. No. 16, R. 212).

On April 18th, the ship's agents received a letter from the Shipping Board, referring to the Woodburn, another one of the vessels involved, advising that "at present no Russian vessel is allowed to leave American ports."

The reference to "Russian" vessels is due to the fact that these Finnish vessels had sailed from foreign ports, flying the Russian flag, while Finland was still a Grand Duchy of Russia and upon arrival were entered as "Russian" vessels. Although the masters immediately cabled abroad for a description of Finland's flag, and replaced the Russian flag with the new Finnish flag, the vessels were referred to in contemporary correspondence sometimes as Russian vessels, sometimes as Finnish vessels and sometimes as Russian-Finnish vessels. The Court of Claims has so found (Special Finding of Fact No. 11, R. 17).

On April 24th, in response to suggestions from the ship's agents to the Shipping Board for a modification of the Shipping Board's proposed charter of the vessels in order to make it acceptable to the owners, the Shipping Board advised the ship's agents that the principal point involved in the Board's offer to charter the vessels was "the removal of the crews" (R. 128).

The disposition of these Finnish ships had been the subject of extended discussions in the War Trade Board, the Shipping Board and the State Department prior to April 17th, when the Shipping Board's representative called at the office of the ship's agents and offered to charter the vessels. On April 3rd, the War Trade Board wrote the Ship-

ping Board saying that they were strongly in favor of the vessels being taken over by the Shipping Board or one of our Allies, because the personnel of the crews made them an undesirable risk, and on the same day the Shipping Board instructed one of its employees to investigate the situation and report his recommendations thereon, adding, "In the meantime the ships will be held" (Deft's. Ex. No. 13, R. 210. Special Finding of Fact No. 11, R. 17, 18).

The attitude of the War Trade Board and the Shipping Board in the matter is summarized in a letter from the Shipping Board to the British War Mission, dated April 12th, as follows:

"Captain Thos. Fisher,
British War Mission,
Munsey Bldg.,
Washington, D. C.

DEAR SIR:

RUSSIAN SAILING VESSELS

When you were last here, we talked over the question of the Russian Sailing Vessels ALBYN, PROMPT, and PROFESSOR KOCH.

These vessels were all approved by the Chartering Committee some months back and we could not understand why the War Trade Board was holding them up. They now tell us that all Russian sailing vessels are being held and the matter has been the subject of many discussions before the War Trade Board. It seems to be a question of these vessels being manned by Russian crews and the American Government do not seem to be willing to trust these vessels to go to sea fully manned by Russians.

This matter you might take up with Mr. Munson and he will, no doubt, be in a position to advise you fully.

Yours very truly,
FOR THE COMMITTEE."

JBS/TGA.

(Deft's. Ex. No. 14, R. 211.)

On April 20th, the War Trade Board adopted a resolution authorizing its licensing bureau to refuse bunker licenses for vessels "whereof the owners, masters or officers are reported by the Bureau of War Trade Intelligence to be suspected of enemy affiliations or of being engaged in enemy activities" (Deft's. Ex. No. 12, R. 210).

No evidence was offered by the government to show that the Bureau of War Trade Intelligence ever reported that the "owners, masters or officers" of these Finnish vessels were "suspected of enemy affiliations or of being engaged in enemy activities". But the Shipping Board's representative who was attempting to negotiate a charter of these vessels, did report to his superior after his first conference with Whitney & Company, that it had been reported to him that "the greatest part of the crew and masters had the worst reputation. Some of them are openly pro-German and, not considering political feelings, they are far from reliable in many questions, and spend most of their time drinking" (Deft's. Ex. No. 16, R. 212).

Following the Shipping Board's offer on April 17th to charter the vessels, negotiations therefor continued until June 10th, when the Shipping Board advised the ship's New York agents that the Board was no longer interested in chartering the vessels (Special Finding of Fact No. 11, R. 17, 18-19, 24-25).

A week later, June 17th, the owners' London agents took up the matter with the American War Trade Department, which was connected with the American Embassy in London, and inquired what could be done in order to have the vessels released, and on June 18th, the American Charge d'Affairs at the London Embassy cabled the Secretary of State at Washington, advising of this inquiry and asking what was required to settle the matter (R. 164, Special Finding of Fact No. 13, R. 23).

On June 20th, the War Trade Board instructed its Bureau of Transportation as follows:

> "Upon agitation with the State Department regarding the following Russian sailing vessels (Albyn, Fahrwohl, Professor Koch, Kensington and Prompt), they have decided that perhaps it will be all right to let them proceed to South Africa, provided we are perfectly sure that none of the crews are Bolsheviki; or sympathizers with the Bolsheviki regime.
>
> "Please take this up with the Navy and have the crews gone over with a fine tooth comb, preparatory to taking some action towards allowing them to go" (Special Finding of Fact No. 13, R. 23).

On June 21st, the War Trade Board's Bureau of Transportation requested the Naval Intelligence Bureau of the Navy to investigate the crews of the Finnish vessels, saying that "the situation with regards Russian vessels has been a somewhat delicate one, and we have felt it was rather unsafe to allow such vessels to proceed" (Special Finding of Fact No. 14, R. 24-25).

On June 27th, that is, within one week from the date the investigation was ordered, Naval Intelligence made a lengthy report of its investigation of the crews to the War Trade Board, in which it was found that the War Trade Board's suspicions of the crews were wholly unfounded (Special Finding of Fact No. 14, R. 24-27), and on July 9th, the War Trade Board, by reason of this report, directed the issuance of the bunker license for the ALBYN, and it was issued on the 12th (Special Finding of Fact No. 15, R. 26-27).

Some contemporary correspondence and documents were offered in evidence upon the trial which indicated that, in addition to the foregoing suspicions against the crews, the State Department and War Trade Board were disturbed by the political situation in Russia and Finland, following

Russia's military defeat by Germany, the Russian Revolution and Finland's Declaration of Independence of Russia, and this fact, also, apparently had some bearing on the delay in issuing a bunker license (R. 145-147, 154-155).

The Court of Claims, by its Special Finding of Fact No. 16, finds that "the conditions and circumstances which formed the basis" for the failure of the War Trade Board to grant license for necessary ship's stores and supplies, that is, the bunker license, were

> "(a) the probability of the vessels proceeding through the war danger zone, and, due to their speed, their possible seizure by enemy craft and the appropriation of the cargoes and stores for enemy purposes; (b) the uncertainty of the political situation in Russia and Finland, and (c) the character and responsibility of the officers and crews of the vessels" (R. 27).

and further found that the detention under such circumstances was not unlawful (Special Finding of Fact No. 18, R. 28).

We have not referred previously to the alleged "probability" of the ALBYN'S proceeding through a war danger zone as one of the reasons for the withholding of the bunker license, because petitioners contend that there is no evidence in the record whatever which justifies such a finding. The only testimony on this point is that no such reason was ever given the ship's agents while the ALBYN was detained (R. 47, 58-59), and the contemporary documents, including the correspondence between the ship's agents and the Shipping Board and the War Trade Board (R. 117-163), and contemporary inter-office memoranda of the last named organization (R. 179-219), contain no statement that could possibly be construed as an objection to the sailing of this vessel on any such ground.

Also the offer by the Shipping Board to cause said vessel to make the same voyage which she proposed to make under

the charter with Vacuum Oil Company (R. 59-60, 126-127), and which the ALBYN did make later, if the ALBYN were chartered to the Shipping Board, is conclusive evidence that no such objection was ever raised, or could be raised.

Furthermore, the records of the Custom House at New York City, which are in evidence, (Pltff's Ex. No. 15, R. 166-168) show that, during the period that the ALBYN was detained, 117 other sailing vessels, of various other nationalities, were granted bunker licenses and cleared from New York on voyages through the North Atlantic similar to the voyage that the ALBYN proposed to make. This fact also demonstrates that the voyage which the ALBYN proposed to make was not barred by War Zone restrictions, and that that was not one of the reasons why said vessel was detained.

The documents offered in evidence by the government relating to the so-called danger zone show only that the subject of war danger zones was one of constant discussion and great confusion, (R. 173-179, 218-219) but they show conclusively (Deft's Ex. No. 30, R. 216-218) that the boundaries were fixed for the express purpose of not interfering with the continued use of sailing vessels on voyages such as was planned by the ALBYN.

Questions Presented.

1. Did the War Trade Board act lawfully in detaining for 130 days the Finnish owned and registered sailing ship ALBYN, loaded in March, 1918, in New York, with cargo licensed by the War Trade Board for export to a British port on the east coast of South Africa, under a charter approved by the Shipping Board and the Inter-Allied Chartering Committee of London by refusing a bunker license for ship's stores necessary for said voyage, because of suspicions of "the character and responsibility of the officers and crew" of said vessel, when such suspicions were proven

unfounded by the government within one week from the date investigation thereof was requested by the War Trade Board near the end of the period of detention?

2. Did the War Trade Board act lawfully in detaining said ship for 130 days by refusing a bunker license for ship's stores necessary for said voyage because of "the uncertainty of the political situation in Russia and Finland", following the Russian Revolution in 1917, Finland's Declaration of Independence of Russia, and the withdrawal of Russia as an active ally of the United States and other allied nations against Germany and Austria?

3. Did the War Trade Board act lawfully in preventing said ship for 130 days from starting such voyage on the alleged ground that said voyage "probably" would take the vessel into a war danger zone when it appears that during the time the ALBYN was so detained.

(a) 117 other sailing vessels of various other nationalities were granted bunker licenses and clearances for similar voyages,

(b) the Shipping Board offered to cause the ALBYN to make the same voyage with the same cargo if said vessel were chartered to it,

(c) the Shipping Board by approval of the ALBYN'S charter sanctioned the proposed voyage,

(d) the alleged ground neither existed nor was asserted at any time during the detention?

4. For the purpose of computing the daily earning value of said vessel, assuming that the ALBYN was unlawfully detained, should the period between the date of the discharge of her cargo and the date she started on another voyage be added to the time required for the vessel to earn the freight moneys paid under the charter to Vacuum Oil Company?

5. If it be found that the ALBYN was unlawfully detained, are not the owners entitled to recover interest on the amount of damages sustained as a part of the "indemnity" which the Act of Congress authorizing the suit directs shall be determined?

Reasons for Granting Petition.

The grounds upon which the writ of certiorari is asked are that

(a) The case has been decided contrary to both local and International Law, in holding that unfounded suspicions against the officers and crew of the ALBYN constitute a defence to a claim for damages sustained as a result of the detention.

(b) The case has been decided contrary to both local and International Law, in holding that the uncertainty of the political situation in Russia and Finland constituted a defense to a claim for damages for preventing the ALBYN from making a voyage from New York to a port in British territory on the east coast of South Africa.

(c) The case has been decided contrary to the facts in holding that one reason for the detention of the vessel was the "probability" that said vessel would proceed through a war danger zone, and contrary to local and International Law, in preventing a Finnish vessel from making a voyage similar to voyages authorized by the United States for 117 vessels of other nationalities while the ALBYN was detained.

(d) The Court of Claims itself appears to be in doubt as to the correctness of its decision herein because,

(1) although under the terms of the special jurisdictional act the Court was not required to go further after deciding that the detention of the ALBYN was not unlawful, it nevertheless proceeded and decided that "if

it should be held that the Albyn was unlawfully detained;" the United States would be obligated to indemnify the owners for the damages sustained, and it also proceeded to determine the amount of the indemnity which the United States should pay;

(2) although all twelve suits brought under the special jurisdictional act were tried and argued in the Court of Claims at the same time, a decision in this one case alone has been rendered. The Court, apparently anticipating an appeal in this case, is apparently withholding decision in the other eleven suits until its decision in this case has been reviewed by this Court.

(e) The claim is one which has been sponsored by the Government of Finland, and should receive the consideration of this Court.

In addition to the points referred to in (a), (b) and (c) above, petitioners claim that two errors were made by the Court in fixing the amount of indemnity which should be paid, if it be found that the detention was unlawful, but in view of the fact that such questions become important only in the event that this Court should find that the detention was unlawful, we will not burden this Court with a discussion thereof in this petition for a writ of certiorari or in the supporting brief.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a transcript of the record and the proceedings herein to the end that this cause may be reviewed and determined by this Court, as provided by law, and that the said judgment of the United States Court of Claims be reversed by this Honorable Court and the

cause remanded to that court with directions to proceed according to law, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper, and your petitioners will ever pray.

New York City, November 19, 1941.

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